80-739

No.

FILED

OCT 6 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AAA TRUCKING CORPORATION and
EUGENE C. BONACCI,

Petitioners,

vs.

LEROY GREEN and DIRECTOR OF THE
DIVISION ON CIVIL RIGHTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

HERBERT BURSTEIN
of the New York Bar
Counsel for Petitioners
One World Trade Center
Suite 2373
New York, New York 10048
(212) 432-0940

RUSSO, TUMULTY & NESTER
921 Bergen Avenue
Jersey City, N.J. 07306
(201) 653-2090

HERBERT BURSTEIN
of the New York Bar
Attorneys for Petitioners

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Whether there is a federal labor law which establishes standards binding upon State courts in the determination of cases involving alleged violations of State laws against discrimination in employment so that conflicts with federal law may be avoided and rights granted to employers by Congress may not be frustrated.

2. Whether the New Jersey Law Against Discrimination ("Act") [N.J.S.A. 10:5-1 et seq], as interpreted by the New Jersey courts, imposes such onerous, harassing and conflicting conditions on an interstate carrier's right to discharge or discipline an employee as to hamper it in the conduct of its interstate trucking business.

3. Whether a charge of a discriminatory discharge may be purged by an offer of reinstatement, reserving to the employee and the employer the right of recourse to later arbitration under a collective bargaining agreement.

Parties to the Proceeding

Petitioners-Appellants

AAA Trucking Corporation and Eugene C. Bonacci

The Respondents-Appellees

Leroy Green and the Director of the Division on Civil Rights of New Jersey

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	i
STATEMENT OF JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	12
APPENDIX:	
A—Opinion of the Superior Court of New Jersey, Appellate Division	1a
B—Order of the Supreme Court of New Jersey Denying Petition for Certification	20a
C—N.J.S.A. 10:5-1 and 10:5-12a	21a

Cases Cited

Alexander v. Gardner-Denver Company, 415 U. S. 36 (1974)	9
Bradford v. Sloan Paper Co., 383 F. Supp. 1157 (N.D. Ala. 1974)	9
Furnco v. Waters, 438 U. S. 567 (1978)	9, 11
Hampton v. Mon Sun Wong, 426 U. S. 88 (1976)	6

PAGE

International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977) 7

Kunda v. Muhlenberg College, 621 F. 2d 532 (3d Cir. 1980) 8

Local 174 Teamsters v. Lucas Flour Co., 369 U. S. 95 (1962) 6

McDonald v. Sante Fe Trail Transportation Co., 427 U. S. 273 (1976) 7

McDonnell-Douglas Corp. v. Green, 411 U. S. 792 (1973) 9

Pearson v. Borden Metal Products Company, 434 F. Supp. 841 (N.D. Ala. 1977) 9

Peper v. Princeton University Board of Trustees, 77 N. J. 55 (1978) 7

The Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U. S. 714 (1963) 6, 10

Textile Workers Union v. Lincoln Mills, 353 U. S. 48 (1957) 6

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 6

United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U. S. 574 (1960) 6

Worthy v. U. S. Steel Corp., 616 F. 2d 698 (1980) 7

United States Constitution Cited

Fifth Amendment 5, 6

PAGE

Statutes Cited

N.J.S.A. 10:5-1 (New Jersey Law Against Discrimination Act) ..... i, 2, 10

N.J.S.A. 10:5-12a 2

28 U.S.C.:

Sec. 1257(3) 2

42 U.S.C. (Cvil Rights Act of 1964, Title VII):

Sec. 2000e 5-7, 10

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AAA TRUCKING CORPORATION and
EUGENE C. BONACCI,

Petitioners,

vs.

LEROY GREEN and DIRECTOR OF THE
DIVISION ON CIVIL RIGHTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Statement of Jurisdiction

On July 14, 1979, the New Jersey Division on Human Rights entered an order which found that the petitioners-appellants ("petitioners") violated the Act by discharging a black employee and had engaged in a pattern and practice of discrimination (A 2a). An appeal from this order was taken to the Superior Court of New Jersey, Appellate Division which, on February 28, 1980, affirmed so much

thereof as determined that the discharge of the Respondent-Appellee Leroy Green ("Green") was unlawful and reversed and remanded to the Division of Human Rights of New Jersey that part which found a pattern and practice of discrimination (A 1a-19a). A timely petition for certification of the aforesaid judgment was filed with the Supreme Court of New Jersey. The petition was denied on July 8, 1980 and the order of denial was filed on July 10, 1980 (A 20a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Statute Involved

The following statute which is involved in this case is set forth in Appendix C infra:

N.J.S.A. 10:5-1 and 10:5-12a

Statement of the Case

The facts, as disclosed by the record on appeal to the Appellate Division of the Superior Court of New Jersey and to the Supreme Court of New Jersey and in Appendix A hereto, show that petitioner AAA Trucking Corp. ("AAA") is a New Jersey based interstate motor common carrier (A 6a). In 1958, AAA employed respondent Green, a black driver, subject to the terms of a labor contract ("Contract") with Teamster Local 701 ("Union") (A 5a). In 1965, Green was elected shop steward of AAA's Trenton, New Jersey terminal (A 5a) and continued in that capacity until his discharge.

On March 16, 1973, when Green reported to work, he found a note on the steering wheel of the tractor as-

signed to him, reading "clean this truck, pig". He believed that one James Holman ("Holman") a white employee, authored it (A 6a-7a). Green accused Holman of placing the note in his tractor. Holman steadfastly denied this charge and alleged that Green had threatened and, in fact, assaulted him. (A 7a). The incident was ultimately reported to petitioner-appellant Eugene C. Bonacci ("Bonacci") who investigated the matter by interviewing five co-workers who were witnesses and who confirmed, in writing, the verbal abuse and threats to Holman (A 8a). Bonacci then consulted the independent labor relations expert who had negotiated the Contract and was advised that Green should be dismissed for a violation of the Contract (A 9a). As required by the Contract grievance procedures, Bonacci wrote to Green informing him and the Union of the dismissal (A 9a). Green was then asked by Bonacci to arrange for a meeting at the terminal with John Dolan ("Dolan"), a Union representative, to discuss the discharge (A 10a). Green thereupon filed a grievance, claiming that he had been dismissed because he was a shop steward; he did not charge racial discrimination, even though he knew that the Contract proscribed such discrimination.

At the informal conference attended by Green, Dolan, Holman and Bonacci, Dolan requested Bonacci to offer reinstatement to Green. Bonacci agreed to change the dismissal to a two-week suspension without pay (a remedy frequently employed under the Contract) but with a reservation to Green of the right to arbitrate a claim for the two weeks' pay (A 10a). Further, since the two weeks had elapsed, Green would have been returned to work immediately. Green rejected this offer on the ground that accepting the suspension would constitute an admission of "guilt" (A 10a). Indeed, he refused reinstate-

ment before any conditions were stated by Bonacci. When his offer was rejected, Bonacci dismissed Green and the Union demanded formal arbitration under the labor contract.

In July 1973, Green's grievance was submitted to, and heard by, an impartial arbitrator designated by the New Jersey State Board of Mediation. The impartial arbitrator decided that Green had been terminated for just cause (A 15a). Green never sought to vacate the award.

After his discharge, namely on March 19, 1973, Green filed a complaint with the New Jersey Division on Civil Rights ("Division") alleging a violation of the Act. One year and seven months later, the Director of the Division ("Director") issued a Finding of Probable Cause; four years and two months after the complaint was filed, Green's complaint was amended to add the Director as a complainant and to include a pattern and practice charge; four years and four months after the original complaint was filed, hearings commenced before a Hearing Officer of the Division; five years after the complaint was filed by Green, the Hearing Officer issued his Recommended Findings of Fact and Conclusions of Law ("Recommendations") sustaining the complaints by Green and the Director; and on July 14, 1978 the Director, as a party to the proceedings, adopted the Recommendations and issued his Findings, Determination and Order ("order") thereby sustaining his own complaint (A 2a).

AAA and Bonacci appealed from the order to the Appellate Division of the Superior Court of New Jersey. On February 28, 1980, the Appellate Division affirmed the order in favor of Green but vacated that part which sustained the Director's complaint, and directed a remand to the Division (A 19a).

A timely petition for certification, filed with the Supreme Court of New Jersey, was denied on July 8, 1980 and an order of denial was filed on July 10, 1980 (B 20a).

Reasons for Granting the Writ

1. The issue raised in question 1 is of paramount importance in that it involves an overriding national interest, namely a construction of a State anti-discrimination law which imposes unconstitutional burdens on interstate commerce and conflicts with the decisional precedents of this Court under Title VII of the Civil Rights Act of 1964 [42 U. S. C. §2000e *et seq.*] upon which the Act is based; and will affect the rights of employers and employees throughout the United States who operate in interstate commerce and are parties to national labor agreements.

2. The issues raised in questions 2 and 3 are equally significant because employers who have relied upon decisions of this Court in fashioning their employment practices are exposed to the vagaries of state law and a multiplicity of sanctions under State anti-discrimination statutes which depart from, and subvert, decisional precedents enunciated by this Court and are denied and deprived of due process by reason thereof and by reason of long and unconscionable delays in processing discrimination claims by State agencies, delays over which employers have no control.

1. Petitioners submit that there are overriding national interests which justify intervention by this Court because the Act, identical with the federal Civil Rights Act, has been construed by the New Jersey courts in a manner which violates the due process clause of the Fifth Amend-

ment to the Constitution. *Hampton* v. *Mon Sun Wong*, 426 U. S. 88 (1976).

(A) A decision by this Court on the issues presented here is not foreclosed by *The Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963). On the contrary, this case poses the very questions which were not resolved by (because not presented to) this Court (Id. at 721-722). The Act, as construed by the New Jersey courts, does impose "onerous, harassing and conflicting conditions on" an interstate motor carrier and imposes "a constitutionally prohibited burden on interstate commerce" (Id. at 721-722). Equally significant, the Act, as interpreted by the New Jersey courts "stands as an obstacle to the full effectiveness of" Title VII of the Civil Rights Act of 1964 (42 U. S. C. §2000-e et seq.)

Employment by interstate motor carriers is exclusively in interstate commerce. There is, accordingly, the same need for uniformity of standards and for a federal law of employment discrimination as there was, and is, for a federal labor law in the area of collective bargaining and arbitration. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456 (1957); *Local 174 Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).

An employer, with terminals in several States, who must respond to the varieties of differing State anti-discrimination statutes and a whole congery of State court constructions of those statutes is, and will be, exposed to massive liability under State anti-discrimination laws even though he has fashioned an employment policy guided by deci-

sions of this Court. Indeed, the construction of the Act by the New Jersey courts means that a member of a minority class must always be hired and must never be fired. This result was adumbrated by the decision in *Peper* v. *Princeton University Board of Trustees,* [77 N. J. 55 (1978)] which held that the New Jersey courts are not bound by the standards which this Court has enunciated.

Collective bargaining agreements will be rendered irrelevant if the decision by the New Jersey courts is not reversed. In *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 336 (1977), this Court held that where discrimination is alleged, the complainant "had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice". No such test was adopted by the New Jersey courts in the case at bar. An isolated incident, involving one black driver, who had been employed since 1958, had been a shop steward and had never registered a complaint of discrimination until 1973 when he was disciplined under a national Teamsters contract, became the occasion for a theory of discrimination which frustrates the objectives of the federal Civil Rights Act and rejects the lessons of this Court's decisions.

(B) Under the rubric of disparate treatment, State courts will be free, if the decision of the New Jersey courts is not reversed, to establish *ad hoc* tests of comparability when, as the Court of Appeals for the Third Circuit pointed out in *Worthy* v. *U. S. Steel Corp.,* 616 F. 2d 698 (1980), an employer is not obliged "to impose on the minority employee the minimum . . . sanction. . . ." [Id. at p. 704].

While "precise equivalence" is not required, *McDonald* v. *Sante Fe Trail Transportation Co.,* 427 U. S. 273, 283 fn. 11 (1976), there must be a demonstration that the cir-

cumstances which occasioned the discharge of a minority class employee were sufficiently parallel to those involving white workers to support an inference of comparability.

In the case at bar, the finding of disparate treatment was based on two incidents which occurred in the fifty year history of AAA. These were clearly distinguishable from the circumstances of Green's discharge (A10a). Here, the so-called proof consisted of two prior instances of fights among white employees (which occurred in 1970 and 1973), when AAA imposed no disciplinary sanctions.

The first incident, in 1970, involved two drivers who engaged in an altercation which took place outside the Trenton terminal and was not witnessed by AAA's manager and was not reported to management. The second incident, in 1973, involved a white dock worker and a terminal manager, who initiated an assault on the employee. This was not evidence of pro-white bias, but rather managerial justice: it was the manager who was the aggressor. And the New Jersey court acknowledged that "more warnings were sent to whites than blacks for violations of regulations" (A14a).

On the exiguous evidence of two alleged comparable situations in fifty years, the New Jersey courts found disparat treatment, contrary to the teaching of *Kunda* v. *Muhlenberg College,* 621 F. 2d 532 (3d Cir. 1980).

What the New Jersey Court did was to create a fictive presumption, without requiring a showing of a *prima facie* case by the complainant, that the dismissal of a black employee by a white manager is racially motivated and that discriminatory intent must be disproved by the employer. This stands the burden of proof standard, approved by this Court, on its head. It means, in effect, that an employer has the initial burden of proof that he is not

motivated by racial animus. If anything, in this case, Green's employment since 1958 without any claim of discrimination until 1973, creates a presumption in favor of AAA, which the New Jersey courts disregarded. This was not an instance of past discrimination memoralized by a labor contract.

The federal law is clear that a discharge of a minority class employee does not implicate discrimination unless it is deliberate, rather than accidental. Green utterly failed to show, either directly or by rational deduction, any intent on Bonacci's part to discriminate against him on the basis of his race. Suspicion and surmise, urged by Green and the Division and adopted by the New Jersey courts, do not satisfy the criterion of "clear and convincing" proof that Green's dismissal was racially motivated.

(C) The New Jersey courts also disregarded the letter and spirit of anti-discrimination statutes which recognize that an employer remains free to terminate an employee, white or black, for whatever reason, absent proof of racial motivation or that alleged business necessity is pretextual. There is "nothing . . . in the record to give credence" to Green's "claim of racially motivated discharge." *Bradford* v. *Sloan Paper Co.*, 383 F. Supp. 1157, 1162 (N.D. Ala. 1974); *Pearson* v. *Borden Metal Products Company,* 434 F. Supp. 841, 850 (N.D. Ala. 1977). It is palpable that the New Jersey courts rejected the standards enunciated in *McDonnell-Douglas Corp.* v. *Green,* 411 U. S. 792 (1973) and *Furnco* v. *Waters,* 438 U. S. 567 (1978).

(D) The New Jersey courts misread the decision in *Alexander* v. *Gardner-Denver Company,* 415 U. S. 36 (1974) when it accorded no weight at all to the arbitration award. Concededly, Green did not claim discrimination

when he submitted his grievance and, it is clear that an adverse arbitration award or a determination by the National Labor Relations Board does not foreclose a civil rights agency from acting. But this Court did not order State agencies and courts to disregard an arbitration award, even one which did not address the issue of racial discrimination. On the contrary, it suggested the appropriate guidelines for the State courts and civil rights agencies in their assessment of the weight to be acorded to an arbitration award when the issue of racial motivation is not litigated in arbitration. Certainly, this Court did not mandate summary disregard of an arbitrator's findings of act (Id. at p. 60, fn. 21). While not determinative, Green's acceptance of the arbitration award, knowing his right to challenge it, is an admission that at least under the labor contract which proscribed discrimination, his dismissal was proper. Relevant, too, are the contract provisions which "conform substantially with Title VII." (Id. at p. 60, fn. 21).

2. The Act (N.J.S.A. 10:5-1) is unconstitutional as construed by the New Jersey courts.

(A) We do not contend that Title VII preempts State anti-discriminatory laws *The Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc., supra,* at 722 but we do argue that while the Act is "identical in purpose with" the federal statute (Id. at p. 722), a construction accorded to a state statute which frustrates the federal statute by imposing conditions rejected by this Court imposes unconstitutional burdens on employers and denies them due process. Thus, to hold that all the evidence in a discrimination case must be construed "in the light more favorable" to the complainant (A 13a) is bizarre, unreasonable and unconstitutional because it denies due process by distorting the rule that the burden of proof by a preponderance of the evidence rests with the complaining party

when discrimination is alleged. Green utterly failed to show any intent on Bonacci's part to discriminate against him on the basis of his race or discriminatory treatment that was deliberate rather than accidental.

The New Jersey courts, relying on a disputed question whether Green had physical contact with Holman, found that this dispute "supported at least an inference that Green was discharged because of his race and activities associated with his race" (A 14a) and that discrimination was proved as a matter of law. This is Orwellian law: an inference of the kind relied upon by the New Jersey courts does not create a *prima facie* case; it is only when the initial burden of establishing a *prima facie* case is satisfied by the complainant that an inference of discrimination "bottomed on impermissible considerations" is raised [*Furnco Construction Corp.* v. *Waters, supra,* at 580].

It is respectfully submitted that this case presents the occasion for clarification of the inter-relationships between federal and state anti-discriminatory laws and the quantum and quality of proof required to establish employment discrimination. These issues have never been submitted to, or resolved by, this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERBERT BURSTEIN
ZELBY, BURSTEIN, HARTMAN & BURSTEIN
2373 One World Trade Center
New York, New York 10048
New York, New York 10048
(212) 432-0940

HERBERT BURSTEIN
Of Counsel

APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

A-5084-77

LEROY GREEN and DIRECTOR OF THE DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

v.

AAA TRUCKING CORPORATION and EUGENE C. BONACCI,

Respondents-Appellants.

Argued—September 24, 1979.

Decided February 28, 1980.

Before Judges Bischoff, Botter and Dwyer.

On appeal from Findings, Determination and Order of the Division on Civil Rights.

Herbert Burstein argued the cause for appellants (Russo, Tumulty & Nester attorneys; Herbert Burstein and James F. Maher, each of the New York Bar, *pro hac vice,* of Counsel).

Gerald R. Stockman argued the cause for respondent Leroy Green (Stockman, Mancino, Marinari, Smithson & O'Donnell attorneys; Maria Marinari Sypek on the brief).

Appendix A

Katherine L. Suga, Deputy Attorney General argued the cause for respondent Director of the Division on Civil Rights (John J. Degnan, Attorney General of New Jersey, attorney; Erminie L. Conley, Assistant Attorney General, of Counsel).

The opinion of the court was delivered by
DWYER, J.A.D.

AAA Trucking Corporation ("AAA") and Eugene C. Bonacci ("Bonacci") appeal from the findings, determination and order made by the Director of the Division on Civil Rights based upon the record, the recommended findings of fact and conclusions of law of the hearing examiner at the end of his 110 page report and, in addition, the Director ordered further proceedings to determine what individuals had been discriminated against by AAA in its hiring practices and procedures and what remedies would be appropriate to grant relief to such individuals.

Leroy Green ("Green") filed a complaint for individual relief because of his discharge based on race in alleged violation of N.J.S.A. 10:5-12(a). The Division found probable cause. After hearing, the filing of the hearing examiner's recommendations, and exceptions thereto, the Division ordered that Green be reinstated by AAA with the seniority rights which he had on March 16, 1973, the date of discharge, and that Green be awarded back pay at simple interest and receive coverage under the pension plan as if he had not been terminated. The order further directed payment of $850 for pain and humiliation suffered as a result of AAA's act of discrimination. The order also contained certain monitoring provisions as to the relationship between AAA and Green.

Appendix A

Shortly before the proceedings on Green's complaint commenced, the Division amended the complaint to assert Division's charge that AAA discriminated against minorities in violation of N.J.S.A. 10:5-4. Following the hearing on the Division's charges, the filing of the hearing officer's recommendations and exceptions thereto, the Division entered an order that directed AAA to set up more objective standards for hiring and that further hearings should be held to determine which individuals had been discriminated against and what remedies would be appropriate.

Respondents have urged a number of grounds for reversal of both portions of the order without organizing them into specific categories.

We first consider the charges that the hearing examiner's conduct prevented a fair development of the record for that attack goes to the whole proceeding. Then we shall consider the appeal from that portion of the order pertaining to Green's individual relief and thereafter that portion granting the relief requested by Division.

I

We agree that "[a] hearing before an administrative agency exercising judicial, quasi-judicial, or adjudication powers must be fair, open and impartial . . .", 2 Am. Jur. 2d, Adm. Law §412, and that this rule applies in our courts. *See Zahorian* v. *Russell Fitt Real Estate Agency,* 62 N.J. 399, 407-408 (1972); *Mazza* v. *Cavicchia,* 15 N.J. 498 (1954). We also agree that a hearing examiner, like a judge, should be patient and impartial.

Appellants point to thirteen examples of unfair conduct of bias by the hearing examiner. We consider separately

the charge that Gerald Stockman, Esq., the attorney for Green, should have been disqualified because his firm had represented AAA.

The hearing examiner ruled that Gerald R. Stockman, Esq. was not disqualified from representing Green even though several years prior his law firm had been involved in workmen's compensation matters on behalf of AAA. The objection was made on the first day of the hearings in July 1977 although Stockman had advised the attorneys for AAA of his representation of Green in November 1975. AAA's attorneys responded to that notice in the same month in 1975. Stockman, himself, had not handled any matters for AAA but he had represented a *guardian ad litem* who had sued AAA. Stockman and four witnesses testified before the ruling was made. The record shows that Stockman's law firm was the successor to a prior firm. However, the two partners who had handled the workmen's compensation cases for AAA had left and taken that account with them, plus the then active files, before Stockman undertook representation of Green. After the challenge was made, Stockman located some transferred inactive closed files that showed his firm had represented AAA. Stockman testified that he had never been to AAA's premises, had never seen any of its files, nor had he had any contact with AAA's personnel.

The inquiry into this matter took almost an entire day. The hearing examiner did not make his ruling quickly as contended by respondents. He made it after a full and thorough inquiry. On this record we find no error in the ruling that Stockman was not disqualified.

We have reviewed the other alleged errors specified under Point F of Appellants' brief and find them to be without merit. R. 2:11-3(e)(1)(E).

Appendix A

II

Green's complaint alleges that AAA and Bonacci discriminated against Green in discharging him on March 16, 1973, contrary to the provisions of N.J.S.A. 10:5-12(a) as then in effect.

Respondents urge reversal because:

(1) the evidence does not support a finding that Bonacci "intended" to discriminate against Green on grounds of race in discharging him; hence, the Division lacked jurisdiction and the case should have been dismissed on motion at the end of Green's case;

(2) the hearing examiner in disregarding the arbitration award under the collective bargaining agreement which concluded that Green had assaulted another employee, James Holman ("Holman"), and, therefore, under the terms of the collective bargaining agreement there was just cause for the discharge of Green by AAA; and,

(3) the evidence does not support a finding that Green was treated differently than other employees.

The evidence on questions 1 and 3 is interrelated and hence those questions will be dealt with together.

The hearing examiner, without considering credibility, was warranted in finding the following:

Green was employed by AAA in 1958 and was an over-the-road driver. He was a shop steward for Local 701 from 1965 to this termination. He is black. He operated out of AAA's terminal in Trenton, New Jersey.

Appendix A

AAA is a trucking company that engages in carrying less-than-truckload shipments (LTL) between Maryland and Massachusetts. It operates two terminals in New Jersey—Trenton and Pine Brook. The latter formerly was located in Linden, New Jersey.

AAA is a family owned business. Bonacci is a part owner of AAA. He is Executive Vice-President and has been employed by AAA in various positions since 1963. In 1973 he was operations manager. His office was at Trenton, New Jersey.

On March 16, 1973, Green reported for work at his regular time of about 3:00 A.M. He picked up the way bills for his regular run to Thomsonville, Connecticut. On March 16, 1973, Green was using a different truck than the day before.

Holman had the job of hooking-up the tractors to the trailers on the line. The tractors were cleaned by special crews on weekends according to Green.

When Green arrived at the tractor he was to use, he found a large piece of paper on the steering wheel on which was written "Clean this truck, pig." Green testified: "On that morning, the morning I came in to get in the truck, to be called a pig, I felt badly and I resented it. I did feel he was calling me as a person, and I did resent it."

Based on his experience, Green knew that Holman was the jockey for the tractors on duty and went to the lunchroom to find him.

There were five employees in the lunchroom besides Holman when Green entered. Green confronted Holman. Ac-

cording to Green, Holman denied that he wrote the note, but admitted that he left it on the steering wheel after he had driven the tractor some 500 feet.

There is no dispute that Green used a loud voice to display his anger and used language which one would expect an angered and powerful truck driver to use.

The critical dispute turns upon whether Green physically assaulted Holman. Green categorically denied that he did. Four of the others denied that Green struck Holman in any manner. Schwed stated that Green struck Holman.

The incident lasted about five to ten minutes. Green then left and went on his regular run. He did not report the incident to his supervisor, Roberts, because Holman had told Green he had shown the note to Roberts. Roberts told Holman to put the note back in the tractor because it was a joke, according to what Green said Holman told him.

Green completed his run in the afternoon, turned in his logs and went home. He did not see or talk to Bonacci that day.

When Green did not receive a call to report for work the next morning, he called. He was told that he no longer worked there. He called Bonacci who did not ask Green for his version of the episode, but told him to call the union delegate, because Green was discharged.

Ralph Aspell, Jr. ("Aspell"), David Thomas Evans ("Evans"), James Edward Roberson ("Roberson"), and Roger A. Roslowski ("Roslowski"), were employees of AAA on March 16, 1973, and were present in the lunchroom. Another person who was present on March 16, 1973 was in the military service and did not testify. Their testimony on behalf of Green was that there were two

tables in the lunchroom. They were at one table and Holman was at the other. Except for Aspell who was not present throughout the incident, all testified that Green did not strike Holman. They testified that Holman was seated throughout the incident. In addition to the aforementioned persons, Albert Schwed ("Schwed") was also in the lunchroom. There was conflicting testimony as to where he was seated. Schwed did not testify. It was stipulated that he had a special relationship to respondent AAA which was not disclosed on the record.

These witnesses also testified that the following morning Bonacci called them into his office together with Schwed. He questioned them together. He then dictated a statement which his secretary typed for all five to sign. Except for Schwed, the four others who were present refused to sign the statement because it contained language that Green physically assaulted Holman. Bonacci ordered that language "exed" out. All present, including Schwed, signed it. Bonacci testified that at this gathering he told the men that he was thinking of suspending Green.

Later that day, Bonacci had his secretary prepare another statement which included the "exed" out language. Schwed then signed this statement as well.

Bonacci was initially called by Green as a witness. In respect to March 16, 1973, he testified that Holman came to him about 8:00 A. M. and told him about the incident. Bonacci testified that he questioned Holman about the affair. He then dictated a summary statement of what Holman said which his secretary typed up. In that statement Green was described as having ". . . verbally assaulted and grabbed the left shoulder . . . of Holman.

Appendix A

Bonacci interviewed Celio, another employee, who was present for part of the affair, at the end of the episode, and took a statement from him. Bonacci also testified that he had talked to the supervisor but took no statement from him. His versions of where and why he talked to the supervisor, Roberts, varied.

Sometime after he had obtained the statements, he talked to Frank Scoto, a labor consultant for a trucking association to which AAA belonged, about what action to take. He could not recall whether that discussion was by telephone or in person. He told him all the facts which Holman gave him but did not mention the other statements. Scoto recommended discharge because it was a disciplinary charge under the collective bargaining agreement.

Thereafter, Bonacci dictated a letter of discharge dated, March 16, 1973. He sent it to Green and the union local on that date. In part it stated: ". . . our company policy simply will not tolerate physical assault by any one of our drivers and under the circumstances, our company has no alternative but to discharge you effective this date, March 16, 1973 . . ." C-1. This letter was introduced on Green's case.

Bonacci testified that when he sent the letter he had no knowledge of any other fights involving physical force between AAA's employees. The only violent incident he could recall was when Green jumped on an AAA truck which Bonacci was following during the 1970 strike. When Bonacci got out of his car, Green left. He admitted that on the Saturday before the hearing, while working with the attorneys, he learned of two incidents involving fights and checked to see if they really happened. He had AAA's records searched and could not find any record of such episodes.

Appendix A

John A. Mattiolli, a white truck driver, testified that in 1970 he and another white employee were in a fight on the parking lot in Linden after stepping out of the terminal. The other employees put a knife to Mattiolli's throat. Mattiolli hit him with his belt buckle. The police arrested both and took them off in a police car. Later the other employee paid some money to Mattiolli's attorney. Each dropped charges. AAA took no disciplinary action.

Edward J. Kelk worked 12 years for AAA in Trenton. He is white. He testified to an incident where Sam Bonacci, Jr., grabbed him and he hit Sam Bonacci, Jr. with sufficient force to knock his glasses off and break them. Kelk confirmed statements in an affidavit that he met with Sam Bonacci, Jr. and Bonacci's father, the day after the incident. AAA took no disciplinary action.

Bonacci also testified that at a meeting on a grievance filed by Green, Green stated his version. The meeting was two weeks after the incident. Bonacci offered to reinstate him with a two week suspension and loss of pay which would go on Green's record.

Green refused because it would have been an admission of guilt and Bonacci would get him later.

Green also testified that he had spoken to Bonacci about hiring more minority members with little success. He related one episode where he sent a friend for a job as a platform worker who was not hired. Instead Bonacci hired a white with a back problem. When Green asked about this, Bonacci hired his friend. The friend was let go within three days because his work was not acceptable Green testified that the dock supervisor told him the friend's work was acceptable.

Appendix A

Ronald Gallimore, a black, testified that he had tried to get Bonacci to hire more minority members at the Pine Brook terminal after he got a number of employees to sign a petition. Although a meeting was held, nothing developed.

In *Peper* v. *Princeton University Board of Trustees,* 77 N.J. 55 (1978), the Supreme Court established guidelines for the burden of proof in discrimination cases involving both disparate treatment and disparate impact. The Court said that the complaining party has the burden of proving by the preponderance of the evidence, even in invidious discrimination cases, that the charged party has discriminated. *Id.* at 80.

The Court said:

> Of course, where state law is involved, the test for a *prima facie* case of discrimination need not be the same as that used in the federal cases arising under Title VII. However, where these standards are useful and fair, it is in the best interests of everyone concerned to have some uniformity in the law. Under Title VII, the United States Supreme Court has recognized two separate theories of relief: 1) disparate treatment and 2) disparate impact.
>
> > "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Village of Arlington Heights* v. *Metro-*

politan Housing Dev. Corp., 429 U.S. 252, 265-266, 97 S. Ct. 555, 50 L. Ed. 2d 450. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *See infra,* at 1861. Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Compare, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-432, 91 S. Ct. 849, 28 L. Ed. 2d 158, with *McDonnell-Douglas Corp.* v. *Green,* 411 U.S. 792, 802-806, 93 S. Ct. 1817, 36 L. Ed. 2d 668. [*Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335, 336, 97 S. Ct. 1843, 1854-1855 n. 15, 52 L. Ed. 2d 396, 415 n. 15 (1977)]

The instant case is concerned solely with disparate treatment.

Both parties agree that *McDonnell-Douglas Corporation* v. *Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) has announced the proper test for a *prima facie* case. *McDonnell-Douglas* was a Title VII case wherein the critical issue concerned "the order and allocation of proof in a private, non-class-action challenging employment discrimination." 411 U.S. at 800, 93 S. Ct. at 1823, 36 L. Ed. 2d at 676. The specific wording of the holding applied to racial minorities.

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677 (footnote omitted)].
>
> However, the tests are equally applicable to other forms of employment discrimination, such as discrimination against females on the basis of sex. *See Meyer* v. *Mo. State Highway Commission,* 567 F. 2d 804, 808 (8 Cir. 1977) *cert. den.* 435 U.S. 1013, 98 S. Ct. 1888, 56 L. Ed. 2d 395 (1978). [77 N.J. at 81-83; footnote omitted].

The Court also recognized that the fourth test would be inappropriate in a number of situations. *Id.* at 83. It is inappropriate in this case.

Defendants urge that the hearing examiner erred when he denied defendant's motion to dismiss at the close of Green's case and at the close of the entire case as to Green because the hearing examiner stated ". . . he must construe all evidence presented for the complainant-respondent in the light more favorable to him." Rb. 34. The hearing examiner applied standards similar to those set forth in *Dolsen* v. *Anastasia,* 55 N.J. 2, 5-6 (1969). We see no reason why a different standard should apply on such motions

in an administrative proceeding than apply in a judicial proceeding. The evidence showed that AAA had never discharged, let alone disciplined, an employee who was engaged in a serious fight before the event in question. Four witnesses to the event testified that there was no physical contact between Green and Holman. Green was black.

We conclude that the hearing examiner did not err in denying the motion at the close of Green's case.

Respondents' proofs showed that more warnings were sent to whites than blacks for violation of regulations. But respondents did not show any situation where an employee had been discharged for fighting. Nor did Holman's testimony on respondents' case convincingly show a different version of the event.

At the close of Green's case, the evidence showed that Green had been a respected employee for a long period of time. Green had worked for the interests of minorities. There was substantial evidence that there was not any physical contact between Green and Holman. Bonacci discharged Green allegedly for the reason stated in his letter. The evidence supported at least an inference that Green was discharged because of his race and activities associated with his race. We find no error in the denial of the motion.

Respondents urge that there must be proof of "intent to discriminate" under *Parker* v. *Dornbierer,* 140 N.J. Super. 185 (App. Div. 1976). In that case this court reversed an order entered against the Dornbierers for violating the Law Against Discrimination where the hearing examiner had stated "'. . . intent to discriminate is not required. If the conduct has a discriminatory effect, it is unlawful discrimination even if there is no express proof of intent to dis-

criminate.'" *Id.* at 189. The complaint was that the Dornbierers had refused to sell their greenhouses to Parker because he employed Puerto Ricans. This court pointed out that the hearing examiner had found that the Dornbierers lacked an intent to discriminate and that there was ample evidence to support their defense that Parker was a bad business risk to sell to.

But as pointed out in the quotation above in *Peper* v. *Princeton University Board of Trustees, supra,* where the court quoted from *Int'l Brotherhood of Teamsters* v. *United States, supra,* the proof of discrimination "'. . . can in some situations be inferred from the mere fact of differences in treatment. . . .'" 77 N.J. at 81.

The hearing examiner's findings of disparate treatment concerning Bonacci's behavior surrounding the discharge and attempts to establish a reason for the discharge, and of Bonacci's actions being intentional are fully supported by the record. We accept them. *State* v. *Johnson,* 42 N.J. 146, 162 (1964).

We consider now the second issue raised by respondents for reversal of the Green award.

Since the arbitration proceeding made no inquiry into the charges of racial discrimination, the hearing examiner did not consider himself bound by the arbitration award under *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d. 147 (1974).

We agree.

We affirm the order entered by the Division in favor of Green for the reason it is amply supported by the record.

Appendix A

III

Respondents under Point D of their main brief and Point II of their reply brief attack the statistical basis used by the Division and urge that the Division never clearly established the relevant "labor pool." Respondents urge that until that base is established there is no sound basis upon which the data from the Trenton SMSA[1] and the Newark SMSA could logically be used.

In *Hazelwood School District* v. *United States,* 433 U.S. 299, 97 S. Ct. 2736, 57 L. Ed. 2d 768 (1977), the Supreme Court reversed and remanded to the trial court for further proceedings a decision of the Court of Appeals for the Eighth Circuit. The Court of Appeals reversed a judgment of the District Court which found a school district had engaged in discriminatory hiring practices where the ratio of black teachers to black students was unfavorable. On appeal the Court of Appeals employed a test of comparing the racial composition of the teaching staff to the racial composition of the qualified public school teachers in the population of the alleged relevant labor market. But this action by the Court of Appeals on appeal denied the school district the opportunity to show that the selected relevant labor pool had special factors which influenced the statistics. The Court said:

> In that case, [*International Brotherhood of Teamsters* v. *United States*], we stated that it is the Government's burden to "establish by a preponderance of the evidence that racial discrimination was

[1] SMSA is the acronym for Standard Metropolitan Statistical Area. The Bureau of the Census of the United States Department of Commerce determines each such area.

the [employer's] standard operating procedure—the regular rather than the unusual practice." Id., at 336, 52 L. Ed. 2d 396. We also noted that statistics can be an important source of proof in employment discrimination cases, since

> "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though §703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." Id., at 340 n 20, 52 L. Ed. 2d 396.

See also Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252, 266, 50 L. Ed. 2d 450, 97 S. Ct. 55; Washington v. Davis, 426 U.S. 229, 241-242, 48 L. Ed. 2d 597, 96 S. Ct. 2040. Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern of practice of discrimination. Teamsters, supra, at 339, 52 L. Ed. 2d 396, 97 S. Ct. 1893. [433 U.S. at 307-308, 57 L. Ed. at 777].

We note that Justice Stewart said in footnote 13 to the majority opinion that in the case of truck drivers comparison to general population statistics may well be appropriate because the skill involved is one that many possess and that others could easily acquire.

Appendix A

Respondents further urge that areas outside of New Jersey as well as portions of the State other than those in the Trenton SMSA and Newark SMSA should be included in determining the relevant labor pool. The former should alegedly be included because geographically they are close to Trenton. The latter should allegedly be added because AAA advertised for applicants.

Our review of the record does not show that the Division explained why the data from the Trenton SMSA established the "relevant labor pool" for the Trenton terminal and why the data from the Newark SMSA established the "relevant labor pool" for the Pine Brook terminal.

Here there was no showing that the terminals would most likely draw the drivers and other personnel from the Trenton SMSA and the Newark SMSA. *See United States* v. *Ironworkers Local 86,* 443 F. 2d 544, 551 n. 19 (9th Cir. 1971), cited in *Teamsters* v. *United States,* 431 U.S. 324, 340, 97 S. Ct. 1843, 52 L. Ed. 396, 418 n. 20 (1977). Nor, was there a showing of the relevant community from which employees were hired in fact.

In *Ironworkers, supra,* 443 F. 2d at 551 n. 19, the Court of Appeals noted that the union's hiring hall and apprentice training facilities were in the City of Seattle and therefore the District Court could properly compare the minorities in union membership to the census data from the City of Seattle. Although the hearing examiner referred to that case, he made no findings to establish the foundation for the relevancy of the data. Instead, he ruled that the defendants had failed to refute it and thereby improperly applied the initial burden of proof and therefore we reverse the determination on this issue.

Accordingly, we do not pass upon other issues tendered for the reversal of the order in favor of the Division.

We affirm the order in favor of Green. We vacate the order in favor of the Division and remand for further proceedings to determine whether AAA did discriminate in their hiring practices and if so what are appropriate remedies. We do not retain jurisdiction.

A True Copy

ELIZABETH MCLAUGHLIN
Clerk

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition for Certification

SUPREME COURT OF NEW JERSEY

C-815 SEPTEMBER TERM 1979

LEROY GREEN, *et al.*,

Complainants-Respondents,

v.

AAA TRUCKING CORPORATION, *et al.*,

Respondents-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5084-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day of July, 1980.

STEPHEN W. TOWNSEND
Clerk

Filed

STEPHEN W. TOWNSEND

Clerk

Jul 10 1980

APPENDIX C

Relevant Statute
[N.J.S.A.]

10:5-1. Short title

This act shall be known as "Law Against Discrimination."

10:5-12. Unlawful employment practice or unlawful discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, or sex of any individual, or because of the liability for service in the Armed Forces of the United States, of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.